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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

9 SAMUEL HOWARD,)
10 Petitioner,) 2:93-CV-1209-LRH-VCF
11 vs.)
12 RENEE BAKER, *et al.*,) **ORDER**
13 Respondents.)
14 /

On August 10, 2015, the United States Court of Appeals for the Ninth Circuit issued an order granting petitioner’s motion for a limited remand for reconsideration of 29 defaulted claims in light of the Supreme Court’s intervening decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). ECF No. 311. Pursuant to that order, this court must not only reconsider those claims in light of *Martinez*, but also address whether it will grant petitioner leave to amend his petition to raise three additional claims. *Id.* This order rules upon petitioner’s motion for leave to amend his petition. ECF No. 316.

22 The three claims petitioner seeks to add to his habeas petition are as follows: (1) a claim that
23 petitioner's death sentence was unsupported by valid aggravators and is thus unconstitutional; (2) a
24 claim that in upholding the sole remaining aggravator the Nevada Supreme Court violated
25 petitioner's due process right to be free from unforeseeable, retroactive expansions of criminal law
26 by the courts; and (3) ineffective assistance of trial counsel (IAC) for failure to challenge the New

1 York “conviction” used to establish the remaining aggravator. At the suggestion of the petitioner,
 2 these claims are hereinafter referred to as the *Johnson claim*, the *Bouie* claim, and the IAC claim,
 3 respectively.¹

4 The parties herein agree that factors to be considered in determining whether to permit
 5 amendment are: bad faith, undue delay, prejudice to the opposing party, futility of the amendment,
 6 and whether the party has previously amended his pleadings. *See, e.g., Bonin v. Calderon*, 59 F.3d
 7 815, 845 (9th Cir. 1995). “However, each is not given equal weight” and “[f]utility of amendment
 8 can, by itself, justify the denial of a motion for leave to amend.” *Id.*

9 Under the circumstances present here, the court finds that neither bad faith, undue delay, nor
 10 prejudice weigh significantly against permitting petitioner’s proposed amendment. Likewise,
 11 petitioner’s prior amended petitions should not foreclose leave to file another in this instance. The
 12 court does conclude, however, that one of three claims petitioner seeks to add is clearly futile.

13 In October 2007, while petitioner’s third amended petition was still being litigated in this
 14 court, petitioner filed a fourth state habeas petition. By the time that proceeding concluded in April
 15 2015, this case was on appeal to Ninth Circuit. In opposing petitioner’s motion for leave to amend,
 16 the respondents do not dispute that petitioner’s *Johnson* and *Bouie* claims were exhausted in that
 17 state proceeding. ECF No. 317, p. 11. While this court reserves judgment as to whether those
 18 claims are now properly before this court for a decision on the merits, petitioner shall be permitted to
 19 add those claims to his petition.

20 Petitioner did not, however, present his proposed IAC claim in his fourth state habeas
 21 proceeding or in any prior state habeas proceeding. Even so, the petitioner argues that the claim is
 22 technically exhausted because it cannot now be presented to the Nevada courts in accordance with
 23 their procedural rules. Be that as it may, this court is not inclined to allow petitioner to proceed in

24 ¹ So named because petitioner indicates that the first claim is based upon *Johnson v. Mississippi*, 486
 25 U.S. 578 (1988), and that the second claim is grounded in *Bouie v. City of Columbia*, 378 U.S. 347
 26 (1964).

1 this court on a claim omitted from all four of his state habeas petitions. See 28 U.S.C. § 2254(b)
2 (habeas petition shall not be granted unless it appears that “the applicant has exhausted the remedies
3 available in the courts of the State”). Moreover, the court finds no merit in petitioner’s argument
4 that the procedural default of the claim can be excused under *Martinez*. The Court in *Martinez* was
5 unambiguous in explaining that its holding “does not extend to attorney errors in any proceeding
6 beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial.”
7 *Martinez*, 132 S. Ct. at 1320. Thus, petitioner’s motion for leave to amend is denied with respect to
8 his JAC claim.

9 **IT IS THEREFORE ORDERED** that petitioner's motion for leave to amend petition (ECF
10 No. 316) is GRANTED in part and DENIED in part. Petitioner is granted leave to add his proposed
11 *Johnson* and *Bouie* claims to his petition, but denied leave to add his proposed IAC claim. Petitioner
12 shall file an amended petition in accordance with this order within **10 days** of its date of entry.

13 **IT IS FURTHER ORDERED** that petitioner shall have **45 days** from the date of entry of
14 this order to file and serve a brief setting forth his position with respect to whether this court shall
15 reconsider his 29 defaulted claims in light of the Supreme Court’s decision in *Martinez v. Ryan*, 132
16 S.Ct. 1309 (2012). Thereafter, respondents shall have **45 days** to file and serve a responsive brief
17 setting forth their positions with regard to petitioner’s *Martinez*-based arguments AND an answer to
18 the two additional claims in petitioner’s amended petition. With respect to the latter, respondents
19 may raise any appropriate procedural defense(s) to the claim in addition to addressing the substantive
20 merit of the claims. After respondents file their responsive brief, petitioner shall have **20 days** to file
21 a reply.

22 DATED this 20th day of May, 2016.


LARRY R. HICKS
UNITED STATES DISTRICT JUDGE